# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 3 |
| Argument | 10 |
| Conclusion | 18 |
| Appendix | 19 |


## CITATIONS

*Cases:*


| | |
|---|---|
| *Berkowitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N. E. 288 | 11 |
| *Blair* v. *Chicago*, 201 U. S. 400 | 12 |
| *Bowles* v. *Strickland*, 151 F. 2d 419 | 12 |
| *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840 | 17 |
| *Burk Bros.* v. *National Labor Relations Board*, 117 F. 2d 686, certiorari denied, 313 U. S. 588 | 15 |
| *Connett* v. *City of Jerseyville*, 96 F. 2d 392 | 12 |
| *Dunlap* v. *United States*, 43 F. 2d 999, appeal dismissed, 45 F. 2d 1021 | 11 |
| *Duplex Co.* v. *Deering*, 254 U. S. 443 | 12 |
| *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452 | 17 |
| *Jacobs, In re*, 31 F. Supp. 620 | 11 |
| *Kindleberger* v. *Lincoln National Bank of Washington*, 155 F. 2d 281 | 12 |
| *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board*, 163 F. 2d 905 | 12 |
| *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. 2d 506, reversed on other grounds, 311 U. S. 584 | 15 |
| *McClure* v. *United States*, 95 F. 2d 744 | 12 |
| *National Labor Relations Board* v. *Austin Co.*, 165 F. 2d 592 | 12 |
| *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. 2d 533 | 14 |
| *National Labor Relations Board* v. *Caroline Mills, Inc.*, 158 F. 2d 793 | 12 |
| *National Labor Relations Board* v. *Crystal Spring Finishing Co.*, 116 F. 2d 669 | 14 |
| *National Labor Relations Board* v. *Dow Chemical Co.*, 117 F. 2d 455 | 15 |

*Cases—Continued* Page

*National Labor Relations Board* v. *E. C. Atkins & Co.*, 165 F. 2d 659 ..... 12

*National Labor Relations Board* v. *Gate City Cotton Mills*, decided April 16, 1948, 21 L.R.R.M. 2695 ..... 12, 17

*National Labor Relations Board* v. *Mylan-Sparta Company, Inc., et al.*, 166 F. 2d 485 ..... 12, 17

*National Labor Relations Board* v. *Brozen*, 166 F. 2d 812 ..... 12, 17

*National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660 ..... 12, 17

*National Labor Relations Board* v. *Skinner & Kennedy S. Co.*, 113 F. 2d 667 ..... 15

*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 ..... 15

*United States* v. *Hooe*, 3 Cranch 73 ..... 13

*United States* v. *St. Louis, S. F. & T. Ry. Co.*, 270 U. S. 1 ..... 11

*Statutes:*

Act of February 25, 1871, 16 Stat. 431, 1 U.S.C. 29 ..... 16

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151 et seq.):

Sec. 8 ..... 19

10 ..... 11, 15, 19

Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C.A., 1947 Supp., Secs. 141, et seq.):

Sec. 101 ..... 11, 16, 23

*Miscellaneous:*

H. Conf. Rep. 510, on H. R. 3020, 80 Cong., 1st Sess., p. 54 ..... 16

S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 26 ..... 16

Sutherland, *Statutory Construction* (3d Ed., 1943):

Vol. 1, Sec. 1936, p. 438, n. 13 ..... 11

Vol. 2, Sec. 2212, .p 136 ..... 11

# In the Supreme Court of the United States

OCTOBER TERM, 1947

---

No. 785

NATIONAL GARMENT COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (Pl. 33-41, 44-67)[1] are reported in 69 N. L. R. B. 1208. The

[1] The printed record for purposes of the petition for writ of certiorari consists of one volume into which have been bound (1) the "Record" in the court below which contains the pleadings and the decision and order of the Board, referred to herein as "Pl."; (2) the appendix filed by petitioners in the court below, referred to herein as "R.A."; (3) the appendix filed by the Board in the court below, referred to herein as "B.A."; and (4) the supplemental proceedings in the court below referred to herein as "Supp."

opinion of the court below (Supp. 7-16) is reported in 166 F. 2d 233. A subsequent *per curiam* opinion (Supp. 31) on the Company's petition for rehearing (Supp. 17-25) and its objections to the proposed decree (Supp. 27-30) is reported in 166 F. 2d 239.

## JURISDICTION

The decree of the court below (Supp. 32-35) was entered on February 5, 1948. On the same day the court entered an order (Supp. 32) denying the petition for rehearing and overruling the objections to the proposed decree. The petition for a writ of certiorari was filed May 4, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether a decision of the Board validly made under the Act prior to amendment was rendered unenforcible by the subsequent amendment which set forth decisional standards to govern Board determinations.

2. Whether the Court below properly applied the standards of judicial review set forth in the National Labor Relations Act, as amended.

3. Whether the Board's order requiring reimbursement of discriminatorily laid off employees who were reinstated prior to the Board's hearing is valid and proper.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Supp. July 1947, Secs. 141, *et seq.*) are set forth in the Appendix, infra, pp. 19.28.

STATEMENT

On March 3, 1945 the International Ladies' Garment Workers Union, AFL, herein called the Union, filed charges with the Board alleging that petitioner, National Garment Company, had engaged in certain unfair labor practices at its Wellsville, Missouri plant, in violation of the National Labor Relations Act.[2] On July 12, 1945 petitioner leased this entire plant and its equipment to Wells-Wear Company which continued to operate the plant without any change in management, personnel, labor policy, or manner of doing business (Pl. 34-35, 46-48; R. A. 2-3, B. A. 4-7, 10-21, 122-125, 140-141, 146-147, 153-159, 163). Thereafter, on August 17, 1945, the Union filed amended charges with the Board alleging that both petitioner and Wells-Wear Company had engaged in unfair labor practices within the meaning of the Act (Pl. 3-5).

On August 6, 1946, following the usual proceedings under Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order

[2] Throughout this statement all references to the Act, unless specifically stated otherwise, are to the National Labor Relations Act of 1935.

(Pl. 33-41, 44-67).[3] The facts as found by the Board and as shown by the evidence, so far as material to the issues here presented are as follows:[4]

Early in February 1945 the employees at petitioner's Wellsville plant became interested in the Union (Pl. 48; B. A. 25). By February 13 a majority of the employees had signed applications for membership (Pl. 48; B. A. 26-27, 196-197). On February 21 the Union mailed a letter to petitioner at its St. Louis office informing it of that fact and requesting "a conference for the negotiations [sic] of improved working conditions and wages" (Pl. 49; B. A. 90, 198). Due to the absence of its president, Rothbarth, petitioner did not learn of the contents of this letter until his return to St. Louis at 4 p. m. on February 27 (Pl. 49; B. A. 140-143).

Within an hour after receiving such knowledge, petitioner undertook a campaign to crush the Union and to defeat its efforts to obtain collective bargain-

---

[3] In these proceedings the Board found (Pl. 34-35, 46-48) upon substantial evidence that Wells-Wear Company was a branch of National Garment Company, and that the two corporations must be regarded as identical for the purpose of safeguarding the statutory rights of the Wellsville employees. The Board further found that by refusing to bargain with the Union, and by otherwise failing to remedy the unfair labor practices commenced by petitioner, Wells-Wear Company engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act, and thereupon prescribed an appropriate remedy which the court below enforced (Pl. 39-41, Supp. 33-35). Wells-Wear Company did not join in the petition for writ of certiorari (See Pet. 2, fn. 1) and no question is here raised as to the validity of the Board's findings with respect to Wells-Wear Company, or to its order against Wells-Wear based upon such findings.

[4] In the following statement record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

ing. A few minutes before 5 p. m. on February 27, the Wellsville plant manager, Pittker, shut off the power in the plant and informed the employees, pursuant to instructions which he had received from St. Louis, that the employees "could have the Union 100 percent if [they] wanted it, but if [they] had the Union, there would be no more bundles open" (Pl. 2, 49; B. A. 2, 28, 47-48, 62-63, 75). Pittker also told the employees that Levey, petitioner's superintendent of production, would come to the plant from St. Louis the following day to address them (*ibid.*). On the same afternoon Forelady Sievert laid off the two collarmakers who prepared shirts for assembly line processing (Pl. 53; R. A. 19, 35, B. A. 131, 169).

After working hours on that evening Mary Sievert, sister of Forelady Sievert, together with Snedeker, one of the laid-off collarmakers, composed a so-called petition "expressing opposition to the unionizing of [the] factory" and reciting also "appreciation of the kindness and cooperation" of petitioner (Pl. 49-50; B. A. 94-95, 100, 247). With the aid of four other employees, 19 signatures were obtained to the petition that evening; the employees whose signatures were solicited were told that the petition would be given to President Rothbarth, that Rothbarth would close the plant if the employees did not renounce the Union, and that the petition would help them keep their jobs (Pl. 50; B. A. 29-30, 50, 65-66, 101, 103, 247).

President Rothbarth and Superintendent Levey arrived at the Wellsville plant at 10:00 a. m. on the following morning (Pl. 50; R. A. 6, 46), and with Pittker and Forelady Sievert, immediately began to remove unassembled shirts from the shelves where they were normally kept before being worked on. The shirts were put into packing boxes of the type used in transporting goods between Wellsville and St. Louis (Pl. 50; B. A. 30-31, 44-45, 51, 215-216, 234). This operation, which was witnessed by many of the employees, was a convincing demonstration that, as Pittker had predicted on the previous day, management would close the plant rather than deal with the Union (Pl. 50; B. A. 31, 45, 51).

After lunch that day the employees were assembled to listen to addresses by Levey and Rothbarth (Pl. 50; B. A. 32, 68). Levey, after assuring the employees that they "could have" a union if they wanted one, immediately pointed out, however, that he doubted whether Rothbarth would run a union factory (Pl. 50; B. A. 68, 80-81). Rothbarth was even more forthright. He told the employees that they could belong to the Union if they wished, but that he "would not bargain" with the Union; that he did not have to keep the factory in Wellsville; and that he would rather deal with "Japs" than with the Union officials (Pl. 50-51; B. A. 32, 41, 57-58). After further disparaging the Union and its officials, he told the employees that he did not want people working for

him who could not make up their own minds and had to have other people (i.e., union representatives) make up their minds for them, that he had intended to invest his money in a new building then under construction in Wellsville, where the employees would have a good place to work, but that, instead, he would leave the building as it stood "as a monument to the people of Wellsville who cannot make up their minds and have to have somebody else make up their minds for them" (Pl. 51; B. A. 34, 58, 83).

Rothbarth also referred to the bargaining request made by the Union and bitterly chided the employees for organizing behind the Company's back (Pl. 51; B. A. 34-35, 59, 113). At the conclusion of his remarks employee Sievert sought to present to him the anti-union petition which she and Snedeker had prepared the previous evening (Pl. 51; B. A. 95, 97-98, 102, 144). Snedeker begged Rothbarth to give the employees another chance (Pl. 51; B. A. 104). Other employees, frightened and intimidated by the course of events, asked how they might regain their Union cards (Pl. 51; B. A. 34, 49, 70-71, 83). Rothbarth, after first disclaiming any interest in the matter, accepted the anti-union petition and then promptly produced a form which, he stated, might serve as an effective withdrawal from the Union if signed by the employees of their own free will before a notary public (Pl. 51-52; B. A. 33, 70-71, 81, 95, 97-98, 102, 144). Pursuant to arrangements previously made, most of the em-

ployees who had joined the Union went to the local banker after working hours and signed sworn statements revoking their Union membership (Pl. 53; B. A. 51, 63-65, 118-119, 179-197, 231).

Notwithstanding the apparent complete success of these efforts to thwart the employees in their undertaking to organize and bargain collectively, petitioner continued to implement its anti-union program by continuing the lay offs begun on February 27. All of the employees who worked on the assembly line in petitioner's plant were laid off in the order in which they completed the work which had already commenced on the morning of February 28 (Pl. 53; R. A. 3-5; B. A. 36-37, 169-177, 233). The last of them were laid off on March 29 (Pl. 53; B. A. 233). On March 13, however, while it was still laying off some of the operators, petitioner began to recall others (Pl. 54; B. A. 233). By April 3, all operators willing to return to work—except Abbie Ruth Cobb who, due to a misunderstanding, was unavailable—were again working (Pl. 54; B. A. 233; R. A. 41-43, 45).

Upon these facts, the Board found (Pl. 59) that petitioner, by its total course of conduct, by the threatening and coercive speeches to its employees, and by the lay off of its Wellsville employees interfered with restrained and coerced its employees and discriminated against them within the meaning of Section 8 (1) and (3) of the Act.[5] It also found

[5] Petitioner offered several explanations to establish that the lay offs were non-discriminatory. These explanations were not only in-

(Pl. 62) that by failing to reply to the Union's bargaining request, and more particularly by Pittker's February 27 announcement and Rothbarth's February 28 speech, petitioner clearly manifested its refusal to bargain with the Union as the representative of its Wellsville employees, thereby violating Section 8 (5) and (1) of the Act. The Board ordered petitioner to make whole the employees whom it had discriminatorily laid off for any loss of pay suffered by them as a result of the lay off; and ordered both petitioner and Wells-Wear Company [6] to cease and desist from the unfair labor practices found; upon demand to bargain collectively with the Union, upon application of employee Abbie Cobb, to reinstate her, and if they refuse to reinstate her, to make her whole for loss of wages which she may suffer as the result of such refusal; and to post appropriate notices (Pl. 39-41).

---

consistent, but, as the Board found (Pl. 57-59), were not supported by the evidence in the record. Thus petitioner first averred, in its answer to the Board's complaint, that "there was no work available in various sections" (Pl. 14, 57). Plant Manager Pittker testified to the contrary, however, and ascribed the lay off to a shipment of defective goods (R. A. 6). Petitioner's final position was that a bottleneck had occurred at the collar-setter point of the production line (Pl. 57-58, R. A. 29-31; B. A. 126-129). The inconsistency of this explanation with the fact that the collar-setters themselves were laid off for several days (R. A. 4, B. A. 233), as well as with other facts set out in the Board's opinion (Pl. 57-59; R. A. 31, 39, 45-48, B. A. 117-118, 129-131, 233), impelled the Board to find, (Pl. 59), that the lay off was not motivated by legitimate business considerations but rather "was utilized as a means of discouraging the organization of the Union and of making sure that the employees lost all inclination toward organizing."

[6] See footnote 3, *supra*.

On May 20, 1947, the Board filed in the court below a petition requesting enforcement of its order (Pl. 70-74).[7] On January 7, 1948, the court below entered its opinion (Supp. 7-16) holding that the Board's findings were supported by substantial evidence, and that amendment of the National Labor Relations Act subsequent to the issuance of the Board's order did not invalidate the order or deprive the court of jurisdiction to enforce it. The court pointed out that insofar as the amendments provided for changes in procedure, these changes were not to be applied retroactively to steps taken prior to the amendments, and that the amendments did not extinguish petitioner's libilities under the initial Act. The court also rejected petitioner's contention that the Board was powerless to order an employer to pay back pay to employees who had been discriminatorily laid off, where the employer had voluntarily reinstated the employees prior to the Board's hearing.

## ARGUMENT

1. Petitioner asserts that because the Board's decision does not disclose on its face that the Board applied the decisional standards set forth in Sec-

[7] Petitioner and Wells-Wear Company on June 23, 1947, petitioned the court below for leave to adduce additional evidence for the purpose of showing that subsequent to the issuance of the Board's order, petitioner had completely divested itself of any relationship to the operation of the Wellsville plant and that consequently, parts of the Board order were unenforceable (R. A. 50-52). The court below denied this motion (R. A. 52-53), holding, as set forth in its principal opinion of January 7, 1948 (Supp. 14), that any change of ownership subsequent to the Board's order did not preclude enforcement of the order.

tion 10 (c) the National Labor Relations Act, as amended (Pet. 14), the decision, though validly issued under the Act as it stood prior to amendment, may not be enforced. The contention is without merit. At the time the Board's decision was issued Section 10 (c) required the Board to state its findings of fact upon the basis "of all the testimony taken." The statute, as amended, requires that the Board "shall" make its findings "upon the preponderance of the testimony taken." The amendment on its face indicates that it is to have purely prospective operation, and is to apply solely to cases to be decided by the Board subsequent to its effective date. This reading of the amendment comports with the well-settled rule, applied by the court below (Supp. 13), that procedural changes effected by amending legislation are to be deemed applicable only to steps taken after such amendment, and are not to be deemed applicable to steps properly taken prior to the amendment. See, e. g., *United States* v. *St. Louis, S. F. & T. Ry. Co.,* 270 U. S. 1, 3; *Berkovitz,* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288, 290; *Dunlap* v. *United States,* 43 F. 2d 999 (D. C. D. Idaho), appeal dismissed, 45 F. 2d 1021 C. C. A. 9); *In re Jacobs,* 31 F. Supp. 620 (D. C. N. D.). See also Sutherland, *Statutory Construction,* (3d Ed., 1943), Vol. 1, Sec. 1936, p. 438, n. 13, and Vol. 2, Sec. 2212, p. 136.

Petitioner offers no indication that Congress intended the amendment of Section 10 (c) to affect

Board decisions previously issued, and petitioner cites no case in support of its contention that the amendment should be given retroactive effect. The decision of the court below on this point accords with the holding of all other circuit courts of appeals which have considered the question (*National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660 (C. C. A. 2); *National Labor Relations Board* v. *Brozen,* 166 F. 2d 812 (C. C. A. 2); *National Labor Relations Board* v. *Caroline Mills, Inc.,* 158 F. 2d 793 (C. C. A. 5); *National Labor Relations Board* v. *Gate City Cotton Mills,* (C. C. A. 5), decided April 16, 1948, 21 L. R. R. M. 2695; *National Labor Relations Board* v. *Mylan-Sparta Company, Inc., et al.,* 166 F. 2d 485 (C. C. A. 6); *National Labor Relations Board* v. *Austin Co.,* 165 F. 2d 592 (C. C. A. 7). There are no contrary decisions.[8]

---

[8] *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board,* 163 F. 2d 905 (App. D .C.), and *National Labor Relations Board* v. *E. C. Atkins & Co.,* 165 F. 2d 659 (C. C. A. 7) are not in conflict, as petitioner alleges (Pet. 6). Like *Duplex Co.* v. *Deering,* 254 U. S. 443 and the several cases cited on p. 16 of petitioner's brief, the decisions in those cases reflect the well settled rule that the courts will not enforce orders operating *in futuro,* where those orders require action inconsistent with the then prevailing law. Petitioner also cites (Pet. 11-12) *McClure* v. *United States,* 95 F. 2d 744, 750 (C. C. A. 9), quoting from *Blair* v. *Chicago,* 201 U. S. 400, to the effect that "a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended." Petitioner fails to note that in the same paragraph, the Court limited its holding to "acts subsequently done.'" Similar limitations are found in the remaining cases cited by petitioner. See *Connett* v. *City of Jerseyville,* 96 F. 2d 392, at 400 (C. C. A. 7); *Kindleberger* v. *Lincoln National Bank of Washington,* 155 F. 2d 281 (App. D. C.); *Bowles* v. *Strickland,* 151 F. 2d 419, at 420 (C. C. A. 5).

It is to be noted that petitioner nowhere asserts that the Board's findings are not supported by a preponderance of the testimony taken.

2. Petitioner contends that the court below erred by failing to apply the standards of judicial review set forth in Section 10 (e) of the amended Act (Pet. 13). Petitioner's assertion that the court below applied the standards of review contained in the initial Act, rather than in the Act as amended, is without warrant. The court below recognized (Supp. 13), as the Board had urged (Brief for the National Labor Relations Board, p. 30), that procedural amendments affect pending cases to the extent that the particular steps to which the amendments apply were not taken prior to the effective date of the amendments. See also, *United States* v. *Hooe,* 3 Cranch 73, 78. Petitioner's contrary assumption rests solely upon a misconstruction of the statement in the court's opinion that "the Board's petition for enforcement is ruled on in this opinion as of the date of the issuance of the order" (Supp. 14). This statement was directed only, however, to petitioner's contention below (*supra,* notes 3, 7) that the change in ownership of the Wellsville plant, which occurred after the issuance of the Board's order, rendered the case moot and compliance with the Board's order impossible. Petitioner did not contend below that any of the amendments effected a change in the law on this issue and petitioner does

not here challenge the validity of the court's ruling in this respect. The issues on which that ruling was made obviously, therefore, did not involve application of the principles governing the effect to be given changes in the standards of judicial review which intervene between the date of a Board order and submission of the order to the court. Nothing in the opinion indicates that the court below, notwithstanding this holding, failed to apply the standards of review set forth in the amended Act, which was in effect at the time the court reviewed the Board's order. Petitioner does not deny that, as the facts set forth in the Statement, *supra,* pp. 3-9, show, the Board's order is amply supported by the evidence in the record considered as a whole.

3. Petitioner argues that under the Act prior to amendment, the Board was without power to order reimbursement of lost wages to employees discriminatorily laid off where, as here, the employees had been reinstated prior to the Board hearing, and the Board's back pay order was therefore not coupled with an order of reinstatement (Pet. 5, 9, 18-22). In support of this contention, petitioner cites only *National Labor Relations Board* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 537 (C. C. A. 9), a decision contrary to the holding of every other Circuit Court of Appeals which has considered the question (*National Labor Relations Board* v. *Crystal Spring Finishing Co.,* 116 F. 2d 669, 672

(C. C. A. 1); *Burk Bros.* v. *National Labor Relations Board,* 117 F. 2d 686, 688 (C. C. A. 3), certiorari denied, 313 U. S. 588; *National Lebor Relations Board* v. *Dow Chemical Co.,* 117 F. 2d 455, 456 (C. C. A. 6); *Link-Belt Co.* v. *National Labor Relations Board,* 110 F. 2d 506, 511-512 (C. C. A. 7), reversed on other grounds, 311 U. S. 584; *National Labor Relations Board* v. *Skinner & Kennedy S. Co.,* 113 F. 2d 667, 669 (C. C. A. 8)), and one which has long since been discredited by the opinion of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197-202. Since the opinion in the *Phelps Dodge* case, no court has questioned the Board's power to order back pay, whether or not such an order is coupled with an order for reinstatement.

Petitioner further argues (Pet. 21-22) that in any event the amendment to Section 10 (c) withholds from the Board the power to issue a back pay order unless coupled with a requirement for reinstatement of employees, and suggests that this change applies retroactively so as to invalidate the Board's order, even though the order was proper when issued. Petitioner's contention that the amendment of Section 10 (c) affects the Board's power to issue back pay orders against employers is frivolous. The language of Section 10 (c) of the National Labor Relations Act which empowered the Board to issue orders requiring persons "to take such affirmative action, including reinstate-

ment of employees with or without back pay, as will effectuate the policies of this Act" was not altered by the amendment. The sole pertinent change was the addition of a proviso reading as follows: "That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." The language of this proviso, as well as its legislative history,[9] demonstrates that its sole purpose was to permit the Board to assess labor organizations as well as employers for back pay depending solely on whether labor organizations or employers were the source of the discrimination found.

4. Because, as has been indicated above, there is no merit in petitioner's contention that the amendment to Section 10 (c) altered the Board's power to order back pay whether or not such an order is coupled with an order of reinstatement, the question which petitioner seeks to raise (Pet. 17-18), concerning the effect of the general savings statute (Act of February 25, 1871, 16 Stat. 431, 1 U. S. C. 29) upon amending legislation is not presented. In any event, as the court below held (Supp. 10-13), it is well settled by decisions of this Court that the general savings statute operates to preserve liabilities which accrue prior to amendment, as well

[9] See S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 26; H. Conf. Rep. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 54.

as prior to repeal, of federal statutes (*Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 464-469). Every court which has considered the question has held that the federal savings statute preserves liabilities for back pay which accrued under the National Labor Relations Act prior to its amendment. *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works, supra; National Labor Relations Board* v. *Brozen, supra; National Labor Relations Board* v. *Gate City Cotton Mills, supra; National Labor Relations Board v. Mylan-Sparta Company, Inc., et al., supra.* Petitioner cites no contrary holdings. In *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840, the Court denied certiorari to review a question concerning the effect of the general savings clause upon liabilities which accrued prior to amendment of the Act similar to that which petitioner here seeks to raise.

## CONCLUSION

The decision below is correct in all respects here challenged, and presents neither a conflict of decisions nor any question warranting review. The petition for writ of certiorari should therefore be denied.

PHILIP B. PERLMAN,
*Solicitor General.*

ROBERT N. DENHAM,
*General Counsel,*
DAVID P. FINDLING,
*Associate General Counsel,*
MOZART G. RATNER,
ARNOLD ORDMAN,
*Attorneys,*
National Labor Relations Board.
JUNE, 1948.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> Sec. 8. It shall be an unfair labor practice for an employer——
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * * *
>
> Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said

complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to

which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings,

testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the

Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A. 1947 Supp., Secs. 141, *et seq.*) are as follows:

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * *

Sec. 8 (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * *

Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any

such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence ap-

plicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.

Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if

all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If

either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 790207 65